CITY OF NEWTON, MASSACHUSETTS

Department of Planning and Development

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Public Hearing Date:	February 22, 2010
Zoning and Planning Action Date:	To be determined
Board of Aldermen Action Date:	To be determined
90-Day Expiration Date:	To be determined

DATE: February 19, 2010

TO: Alderman Marcia T. Johnson, Chairman, and
Members of the Zoning and Planning Committee

FROM: Candace Havens, Interim Director of Planning and Development
Jennifer Molinsky, Principal Planner / Zoning and Planning Coordinator

SUBJECT: **PUBLIC HEARING**
ALD. HESS-MAHAN proposing the following amendments to the accessory apartment ordinances: (1) amend Sections 30-8(d)(1)a) and 30-9(h)(1)a) to explicitly allow the homeowner to live in the accessory apartment; (2) amend Section 30-9(h)(1) to allow accessory apartments in a single family residence located in Multi Residence 1 and Multi Residence 2 zoned districts; and (3) amend the provisions of Sections 30-8(d)(1)b) and 30-9(h)(1)b) to allow accessory apartments in residential buildings built 10 or more years before an application for a permit is submitted; (4) delete the provisions of Sections 30-8(d)(1)(h) and 30-9(h)(1)(h) that require landscape screening for fewer than 5 parking stalls; (5) amend Sections 30-8(d)(1)(d), 30-8(d)(1)(e), 30-8(d)(2)(b) and 30-9(h)(1)(d) to allow exterior alterations and add that any exterior alterations, other than alterations required for safety, are subject to FAR provisions.

CC: Board of Aldermen
Mayor Setti D. Warren
Planning and Development Board
John Lojek, Commissioner of Inspectional Services
Marie Lawlor, Assistant City Solicitor

The purpose of this memorandum is to provide the Board of Aldermen, Planning and Development Board, and the public with technical information and planning analysis which may be useful in the decision making process of the Board. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Zoning and Planning Committee of the Board of Aldermen will consider in its discussion at a subsequent Working Session.

The Planning Department prepared a background memo on petition #164-09 dated January 22, 2010. This memo provides additional information and analysis.

As in the previous memo, the Planning Department supports the following proposed changes, with some additional comments and suggestions:

1. **Explicitly allow the homeowner to live in *either* the accessory unit or main dwelling unit by amending Sections 30-8(d)(1)a) and 30-9(h)(1)a).**

2. **Clarify where accessory apartments are allowed by:**

    a. **Stating that accessory apartments are allowed in detached structures associated with single-family residences located within Multi-Residence (MR) 1 and 2 districts;**

    b. **Clarifying that accessory apartments are also allowed in detached structures associated with two-family residences in MR districts, by amending Section 30-9(h)(1)a);**

    c. **Clarifying that under other provisions of the Zoning Ordinance separate from the accessory apartment by-law, single-family dwellings may be divided into two-family dwellings in MR districts.**

3. **Allow accessory apartments in residential buildings built 10 or more years ago (instead of in buildings built before January, 1989) by amending Section 30-8(d)(1)b) and 30-9(h)(1)b).**

4. **Remove the requirement that parking for accessory apartments be screened (according to standards otherwise applicable only to parking facilities with more than five stalls) by amending Sections 30-8(d)(1)h) and 30-9(h)(1)h).** Under the Zoning Ordinance, a single-family dwelling with an accessory apartment would need to provide three parking stalls (two for the dwelling and one for the accessory apartment) and a two-family dwelling with an accessory apartment would need to provide five (four for the dwellings and one for the accessory apartment). At the January 25th meeting of the Zoning and Planning Committee, Alderman Baker inquired whether a more modest screening requirement could be developed and adopted for accessory apartment parking, rather than eliminate the screening requirement altogether. It is the sense of the Planning Department that though it would be possible to develop a less stringent alternative, there is already text in the Zoning Ordinance in Section 30-22, Review of Accessory Apartments, that states that in reviewing applications for as-of-right accessory units the Planning Director "may consider the application in light of the criteria set forth below," which includes "screening of parking areas and structure(s) on the site from adjoining premises or from the street by walls, fences, plantings, or other means. Location of parking between any existing or proposed structures and the street shall be discouraged" (Sec. 30-22(c)(1)b)). This is not a *requirement* for specific measures, but does encourage the consideration of screening for parking. If the Committee wishes to rely on this existing text in Sec. 30-22, it may wish to consider that, for consistency, the same language be added to Sections 30-8(d)(2) and 3-09(h), so that the same encouragement of screening would apply to special permit applications for accessory apartments.

5. **Allow more exterior alterations, subject to existing dimensional requirements, by amending Sections 30-8(d)(1)d), 30-8(d)(1)e), and 30-9(h)(1)d).** As noted in our previous memo on accessory apartments, the petition would expand opportunities to make exterior renovations to accommodate an accessory apartment and would remove the existing two- and four-year lookback periods (the period of time before an application for an accessory apartment is submitted during which owners cannot build additions or make alterations to accommodate accessory apartments). We have the following concerns, however:

    a. Proposed section 30-8(d)(1)e) should pertain to alterations ***or additions***, rather than simply alterations. Left just with the term "alterations," the new subsection e) could be read to conflict with existing subsection d), and if "alteration" is interpreted to preclude enlargements to a structure, the amendment will not have its desired impact.

    b. In several Sec. 30-8(d)(1)e), the term "structure" should be changed to ***dwelling*** to more accurately describe the main dwelling.

    c. As proposed, section 30-8(d)(1)e), pertaining to external changes for RAAP (as-of-right) accessory apartments in Single Residence (SR) districts, may allow more external changes than would be allowed by special permit in either SR or MR districts. As proposed, the language for RAAP apartments requires that external changes conform to FAR and other dimensional regulations as well as the lot size and building size requirements of Table 30-8; however, special permit projects would be required to conform to these requirements ***and also show that any addition is in keeping with the architectural integrity of the dwelling and residential character of the neighborhood.***

        To address this concern, and to address the Planning Department's previous reservations regarding the extent of external changes that might be possible to accommodate an as-of-right accessory apartment under the proposed language, we recommend that the Committee consider limiting as-of-right changes in some way. Although there are a number of options, such as limiting the square footage that can be added to accommodate an accessory unit, prohibiting alterations to front facades, requiring that accessory units share a front door and vestibule with the main dwelling if accessed from the street façade (rather than having its own street-facing door), the Planning Department again recommends using the RAAP process to ensure that external changes are reasonable and not out of character with the single-family neighborhood. Sec. 30-22(c)(1) might be amended to state that the Planning Director may consider that "The exterior appearance of the dwelling in which the accessory apartment is located is in keeping with the appearance of a single-family home."

In addition, the Planning Department has recommended changes to the definition of "accessory apartment" in Sec. 30-1 to support the changes above.

Please see the following attachments:

A) Comparison of existing and proposed language; ***this comparison includes the new language suggested in this memo in large bold type for the Committee's consideration***;

B) The Planning Department's previous memo on petition #164-09 dated January 22, 2010.

Attachment 1: Current and Draft Language Regarding Accessory Apartments, Including Language Suggested by Planning Department

Sec. 30-1. Definitions.

Accessory apartment: A separate dwelling unit located in a building originally constructed as a single family or two-family dwelling or in a detached building located on the same lot as the single family or two-family dwelling, provided that such separate dwelling unit has been established pursuant to the provisions of section 30-8(d) and 30-9(h) of this ordinance.

Sec. 30-8. Use Regulations for Single Residence Districts.

(d) In single residence districts, an accessory apartment shall be a permitted use according to Table 30-8 and the following provisions:

(1) An accessory apartment is allowed in ~~an owner-occupied~~ single family dwelling in accordance with the procedures of section 30-22, as applicable, and subject to section 30-15, provided that:

a) The accessory apartment is located within a single family dwelling and the owner of the single family dwelling occupies either the dwelling or the accessory apartment; ~~The building in which the accessory apartment is located is an owner-occupied single family dwelling;~~

b) The single family dwelling was constructed ten or more years prior to the date of application for permit to construct an accessory apartment under this section as evidenced by a Certificate of Occupancy for the original construction of the dwelling, or, where no such certificate is available, provided that there is other evidence of lawful occupancy of the existing structure on or before a date at least ten years prior to the date of application; ~~on or before January 1, 1989;~~

c) The accessory apartment shall be a minimum of four hundred (400) square feet and a maximum of one thousand (1000) square feet or thirty-three percent (33%) of the total building size in the dwelling structure, whichever is less;*

d) Exterior alterations required to meet applicable building, fire or health codes are permitted as listed here: doors; windows; no more than two exterior landings which may be covered, which do not exceed fifty (50) square feet in area, and are not within the setback area; stairs which are not within the setback; roof and wall venting~~;~~.*

e) Exterior **additions or** alterations for any other purpose are permitted provided that the **dwelling** ~~**structure**~~ complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1;*

~~e) Additions and exterior alterations to the structure made within four (4) years prior to application may not be applied towards meeting the requirements of Table 30-8;*~~

f) No more than one accessory apartment shall be allowed per lot;

g) There shall be no lodgers in either the original dwelling unit or the accessory apartment;

h) Parking as required by sections 30-19(d)(19) and 30-19(g)~~, and landscape screening as required by section 30-19(i)(1) shall be provided, regardless of the number of parking stalls~~;

i) The apartment shall comply with all applicable building, fire and health codes.

* Requirements marked with an asterisk may be altered by a Special Permit. See Section 30-8(d)(2).

(2) The board of aldermen may grant a special permit in accordance with the procedure in section 30-24 for an accessory apartment in a~~n owner-occupied~~ single family dwelling or a legal non-conforming two-family dwelling or a detached structure provided that the provisions of section 30-8(d)(1) and Table 30-8 are met, except as amended below:

a) The accessory apartment shall be a minimum of four hundred (400) square feet and a maximum of twelve hundred (1,200) square feet, or thirty-three percent (33%) of the total building size in the dwelling structure, whichever is more;

b) Exterior alterations required to meet applicable building, fire or health codes are permitted if in keeping with the architectural integrity of the structure and the residential character of the neighborhood. Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1 and Section 30-15(u)(4) and provided that the alterations are in keeping with the architectural integrity of the structure and the residential character of the neighborhood.. ~~Prospective additions or exterior alterations for the purpose of satisfying the gross floor area requirements for the creation of a proposed accessory apartment in an owner-occupied single family dwelling or a legal nonconforming two-family dwelling which is altered, reconstructed or redesigned for the purpose in whole or in part of satisfying the gross floor area requirements for the creation of a proposed accessory apartment may be allowed, but shall not exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment as provided in this sub-section, whichever is greater.~~ No additions or exterior alterations beyond those in the final grant of a petition may be proposed to enlarge the accessory apartment within two (2) years of receipt of a special permit hereunder from the board of aldermen.

c) The board of aldermen may require that parking be screened from adjoining premises or the street by walls, fences, plantings, or other means. Location of parking between any existing or proposed structures and the street shall be discouraged.

The petitioner shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the board order granting the accessory apartment and certified copies shall be filed with the department of inspectional services, where a master list of accessory apartments shall be kept, and with the assessing department.

When ownership of the property changes, the new owner shall notify the commissioner of inspectional services at which time the commissioner of inspectional services shall conduct a determination of compliance with the board order, the Newton Zoning Ordinance and the State Building Code.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(3) An accessory apartment is allowed in an Overlay District according to the provisions of Section 30-8(d) and Table 30-8. The following land is placed in an Overlay District as specified:

a) Single Residence 1 zoned land in real estate section 63 is placed in Overlay District A.

b) Single Residence 2 zoned land in real estate section 32 is placed in Overlay District B.

c) Single Residence 3 zoned land in real estate section 71 is placed in Overlay District C.

d) Single Residence 1 zoned land in real estate section 61 is placed in Overlay District D.

(4) Pre-existing Units. Notwithstanding the terms of section 30-8(d)(1)-(3) above, an accessory apartment (second dwelling unit) in a single-family dwelling or detached accessory structure shall be considered a lawful use and shall not be required to meet the dimensional criteria of Table 30-8 provided the following criteria are fulfilled:

a) Proof of Existence. An owner-occupant seeking validation of an existing accessory apartment unit as described herein shall have the burden of proof to demonstrate by a preponderance of evidence the existence of said dwelling unit as of December 31, 1979 and ongoing from that date forward by submission of probative documentary evidence to the commissioner of inspectional services. Records including, but not limited to the following, may be submitted:

i) A valid building alteration permit for the premises indicating the construction of the aforesaid second dwelling unit; or

ii) Assessing department records for the premises indicating the existence of the aforesaid second dwelling unit; or

iii) Records of Internal Revenue Service tax returns for the owner(s) of the premises including Form 1040 and Form 1040 Schedule E indicating items such as reported rental income, deductions for improvements to real estate, reported losses on rental income, and casualty losses, all related to the aforesaid second dwelling unit; or

iv) Permits from the department of inspectional services, other than the actual building alteration permit which provided for construction of the aforesaid dwelling unit, such as other building permits, plumbing, electrical and gas fitting permits, which explicitly indicate the existence of the aforesaid second dwelling unit; or

v) Sworn affidavits by former or present tenants of the aforesaid second dwelling unit, or a previous or present owner-occupant of the premises, providing a sworn, notarized attestation as to the existence of the said unit; or

vi) Any other documentary evidence which is material and relevant and demonstrates the existence of said dwelling unit as of December 31, 1979 and forward.

b) Standard of Proof. Conflicting Evidence. If the documentary evidence available is conflicting, the commissioner of inspectional services shall determine after weighing all the evidence if the existence of the dwelling unit as of December 31, 1979 and forward from that date is supported by a preponderance of evidence.

If no department of inspectional services records or assessing department records are available for a given premises, then sworn, notarized affidavits as provided above in section 30-8(d)(4)a)v) shall be presumed to be reliable, unless there is substantial evidence to the contrary.

c) Requirements. The requirements of section 30-8(d)(1)a), b), c), d), f), g), h) and i) must be satisfied.

d) Procedure. Application for the validation of the second dwelling unit under this section 30-8(d)(4) shall be made in accordance with section 30-22(b). The director of planning and development shall review the application for compliance with all the requirements of section 30-8(d)(4)c) above.

Within sixty (60) days of receipt of the completed section 30-8(d)(4) application, the director of planning and development shall indicate in writing to the commissioner of inspectional services whether there has been compliance with all the requirements of section 30-8(d)(4)c) and section 30-22(b).

Upon receipt of notification of compliance from the director of planning and development, the commissioner of inspectional services shall review the application for compliance with all zoning, building, health, fire and safety codes on the premises.

The owner-occupant applicant must secure a certificate of occupancy from the department of inspectional services within one (1) year of the date of the completed section 30-8(d)(4) application for the lawful use of the second dwelling unit. Upon expiration of said one (1) year, if the applicant has not secured said certificate of occupancy, the applicant shall be precluded from any lawful use of the second dwelling unit under the provisions of section 30-8(d)(4). Upon request by the applicant prior to expiration of the aforesaid one year, the commissioner of inspectional services may grant a six (6) month extension if the commissioner deems it appropriate and justified due to extenuating circumstances.

The applicant shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the certificate of occupancy for the accessory apartment which states that before ownership of the property changes, the current owner must apply to the commissioner of inspectional services for a new occupancy permit. Before issuing such occupancy permit, the commissioner of inspectional services must assure that the provisions of the Newton Zoning Ordinance and the State Building Code are satisfied.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(5) If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-8(d) is invalid as applied for any reason, then section 30-8(d) shall be declared null and void in its entirety. (Ord. No. T-41, 8-14-89; Ord. No. T-114, 11-19-90; Ord. No. T-247, 10-5-92; Ord. No. T-306, 11-1-93; V-120, 7-14-97; V-156, 1-5-98; V-173, 5-18-98; V-246, 6-7-99; Ord. No. X-37, 12-2-02; Ord. No. Y-10,4-17-07

TABLE 30-8 DIMENSIONAL REQUIREMENTS FOR ACCESSORY APARTMENTS

	LOT SIZE (s.f.)	BUILDING SIZE (s.f.)
SR1		
RAAP	25,000	4,000

SPECIAL PERMIT	15,000*	3,200
SR2		
RAAP	15,000	3,100
SPECIAL PERMIT	10,000*	2,600
SR3		
RAAP	10,000	2,500
SPECIAL PERMIT	7,000*	1,800
OVERLAY A		
RAAP	43,500	4,400
SPECIAL PERMIT	15,000*	3,200
OVERLAY B		
RAAP	16,000	3,600
SPECIAL PERMIT	10,000*	2,600
OVERLAY C		
RAAP	10,000	3,100
SPECIAL PERMIT	7,000*	1,800
OVERLAY D		
RAAP	30,000	4,000
SPECIAL PERMIT	15,000*	3,200
LEGAL NON-CONFORMING TWO-FAMILY IN SR1, SR2, SR3		
SPECIAL PERMIT	25,000*	2,600
MR1, MR2		
SPECIAL PERMIT	8,000	2,600

*If building constructed on lot created prior to December 7, 1953.

Sec. 30-9. Use Regulations for Multi-Residence Districts.

(h) *Additional Provisions Applicable in Multi-Residence 1 and 2 Districts.* In all multi-residence 1 and 2 districts, land and buildings may be used for the following purpose subject to the dimensional controls set forth in Table 30-8:

(1) The board of aldermen may grant a special permit for an accessory apartment in a two-family structure or in a detached structure associated with either a single-family or two-family structure in accordance with the procedure in section 30-24 provided that:*

a) The accessory apartment is located in a single family or two family dwelling or detached structure, and the owner of the dwelling occupies either the dwelling or the accessory apartment; ~~building in which the accessory apartment is located is an owner occupied two family dwelling;~~

b) The two family dwelling was constructed ten or more years prior to the date of application for permit to construct an accessory apartment under this section as evidenced by a Certificate of Occupancy for the original construction of the dwelling, or, where no such certificate is available, provided that there is other evidence of lawful occupancy of the existing structure on or before a date at least ten years prior to the date of application; ~~on or before January 1, 1989;~~

c) The accessory apartment shall be a minimum of four hundred (400) square feet and a maximum of twelve hundred (1,200) square feet;

d) Exterior alterations required to meet applicable building, fire or health codes are permitted if in keeping with the architectural integrity of the structure and the residential character of the neighborhood. Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1 and Section 30-15(u)(4) and provided that the alterations are in keeping with the architectural integrity of the structure and the residential character of the neighborhood... ~~Prospective additions or exterior alterations for the purpose of satisfying the gross floor area requirements for the creation of a proposed accessory apartment in the owner-occupied two-family dwelling which is altered, reconstructed or redesigned for the purpose in whole or in part of satisfying the gross floor area requirements for the creation of a proposed accessory apartment may be allowed, but shall not exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment as provided in this sub-section, whichever is greater.~~ No additions or exterior alterations beyond those in the final grant of a petition may be proposed to enlarge the accessory apartment within two (2) years of the receipt of a special permit hereunder from the board of aldermen;

~~e) Additions and exterior alterations to the structure made within two (2) years prior to application may not be applied towards meeting the requirements of Table 30-8;~~

~~f~~e) No more than one accessory apartment shall be allowed per lot. This shall include instances where the two dwelling units in a two family structure are separately owned and instances where more than one habitable structure occupy a single lot;

~~g~~f) There shall be no lodgers in either the original dwelling units or the accessory apartment;

~~h~~g) Parking as required by sections 30-19(d)(19) and 30-19(g~~), and landscape screening as required by section 30-19(i)(1) shall be provided, regardless of the number of stalls~~;

h) The board of aldermen may require that parking be screened from adjoining premises or the street by walls, fences, plantings, or other means. Location of parking between any existing or proposed structures and the street shall be discouraged.

i) The apartment shall comply with all applicable building, fire and health codes.

The petitioner shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the board order granting the accessory apartment and certified copies shall be filed with the department of inspectional services, where a master list of accessory apartments shall be kept, and with the assessing department.

When ownership of the property changes, the new owner shall notify the commissioner of inspectional services at which time the commissioner of inspectional services shall conduct a determination of compliance with the board order, the Newton Zoning Ordinance and State Building Code.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(2) Pre-existing Units. Notwithstanding the terms of section 30-9(h)(1) above, an accessory apartment ~~(third dwelling unit)~~ in a single-family or two family dwelling or a detached accessory structure shall be considered a lawful use and shall not be required to meet the dimensional criteria of Table 30-8 nor obtain a special permit subject to section 30-24 provided the following criteria are fulfilled:

a) Proof of Existence. An owner-occupant seeking validation of an existing accessory apartment unit as described herein shall have the burden of proof to demonstrate by a preponderance of evidence the existence of said dwelling unit as of December 31, 1979 and ongoing from that date forward by submission of probative documentary evidence to the commissioner of inspectional services. Records including, but not limited to the following, may be submitted:

i) A valid building alteration permit for the premises indicating the construction of the aforesaid ~~third dwelling unit~~ accessory apartment; or

ii) Assessing department records for the premises indicating the existence of the aforesaid ~~third dwelling unit~~ accessory apartment; or

iii) Records of Internal Revenue Service tax returns for the owner(s) of the premises including Form 1040 and Form 1040 Schedule E indicating items such as reported rental income, deductions for improvements to real estate, reported losses on rental income, and casualty losses, all related to the aforesaid ~~third dwelling unit~~ accessory apartment; or

iv) Permits from the department of inspectional services, other than the actual building alteration permit which provided for construction of the aforesaid dwelling unit, such as other building permits, plumbing, electrical and gas fitting permits, which explicitly indicate the existence of the aforesaid ~~third dwelling unit~~ accessory apartment; or

v) Sworn affidavits by former or present tenants of the aforesaid second dwelling unit, or a previous or present owner-occupant of the premises, providing a sworn, notarized attestation as to the existence of the said ~~unit~~accessory apartment; or

vi) Any other documentary evidence which is material and relevant and demonstrates the existence of said ~~dwelling unit~~accessory apartment as of December 31, 1979 and forward.

b) Standard of Proof. Conflicting Evidence. If the documentary evidence available is conflicting, the commissioner of inspectional services shall determine after weighing all the evidence if the existence of the ~~dwelling unit~~accessory apartment as of December 31, 1979 and ongoing forward from that date is supported by a preponderance of evidence.

If no department of inspectional services records or assessing department records are available for a given premises, then sworn, notarized affidavits as provided above in section 30-8(d)(4)a)v) shall be presumed to be reliable, unless there is substantial evidence to the contrary.

c) Requirements. The requirements of section 30-9(h)(1)a), b), c), f), g), h) and i) and section 30-8(d)(1)d) must be satisfied.

d) Procedure. Application for the lawful use of the ~~third dwelling unit~~accessory apartment under this section 30-9(h)(2) shall be made in accordance with section 30-22(b). The director of planning and development shall review the application for compliance with all the requirements of section 30-9(h)(2)c) above.

Within sixty (60) days of receipt of the completed section 30-9(h)(2) application, the director of planning and development shall indicate in writing to the commissioner of inspectional services whether there has been compliance with all the requirements of section 30-9(h)(2)c) and section 30-22(b).

Upon receipt of notification of compliance from the director of planning and development, the commissioner of inspectional services shall review the application for compliance with all zoning, building, health, fire and safety codes on the premises.

The owner-occupant applicant must secure a certificate of occupancy from the department of inspectional services within one (1) year of the date of the completed section 30-9(h)(2) application for the lawful use of the ~~third dwelling unit~~accessory apartment. Upon expiration of said one (1) year, if the applicant has not secured said certificate of occupancy, the applicant shall be precluded from any lawful use of ~~the third dwelling unit~~accessory apartment under the provisions of section 30-9(h)(2). Upon request by the applicant prior to expiration of the aforesaid one (1) year, the commissioner of inspectional services may grant a six (6) month extension if the commissioner deems it appropriate and justified due to extenuating circumstances.

The applicant shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the certificate of occupancy for the accessory apartment which states that before ownership of the property changes, the current owner must apply to the commissioner of inspectional services for a new occupancy permit. Before issuing such occupancy permit, the commissioner of inspectional services must assure that the provisions of the Newton Zoning Ordinance and the State Building Code are met.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(3) If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-9(h) is invalid as applied for any reason, then section 30-9(h) shall be declared null and void in its entirety. (Ord. No. T-114, 11-19-90; Ord. No. T-247, 10-5-92; Ord. No. T-306, 11-1-93; Ord. No. V-173, 5-18-98; Ord. No. V-246, 6-7-99; Ord. No. X-37, 12-2-02; Ord. No. Y-10, 4-17-07)

* A single-family dwelling located in a Multi-Residence 1 or Multi-Residence 2 district may be divided into a two-family dwelling to accommodate a second dwelling unit, subject to compliance with the relevant requirements of the zoning ordinance.

ARTICLE IV. ZONING ADMINISTRATION

The purpose of this article is to protect the health, safety, convenience and general welfare of the inhabitants of the city by providing for a review of plans for certain proposed uses and structures in order to better control potential impacts on traffic, parking, municipal and public services, utilities, and environmental quality in the city, to administer the provisions of this ordinance and to ensure that the proposed uses and structures will be located, designed and constructed in a manner which promotes the appropriate use of land and upholds the purposes and objectives set forth in section 2A of Chapter 808 of the Acts of 1975.

Sec. 30-22. Review of Accessory Apartment Petitions (RAAP).

(a) *Applicability.* Whenever approval is required for an accessory apartment under the provisions of Section 30-8(d)(1), the procedure set forth in this section shall be followed.

(b) *Applications.*

(1) The applicant shall file a site plan application for the proposed development with the director of planning and development and the commissioner of inspectional services. Such application shall consist of two (2) sets of plan(s) prepared, as appropriate, by an architect, landscape architect, professional engineer or land surveyor. Such site plan(s) shall be drawn at a suitable scale, on sheets no larger than twenty-four (24) by thirty-six (36) inches. Except when waived by the director of planning and development, the plans shall include the following information:

a) Evidence of the applicant's ownership of and residence at the subject property;

b) Boundaries, dimensions and area of the subject lot(s);

c) Use of the existing building(s) or structure(s) on the subject lot(s);

d) All existing and proposed buildings, structures, parking spaces, maneuvering aisles, driveways, driveway openings, pedestrian walks, loading areas, and natural areas and landscaping on the subject lot(s) with the dimensions thereof;

e) Facade elevations for any proposed new construction and/or alteration to the existing building or structure;

f) Floor plans for all habitable space or space to be made habitable.

(2) At the time an applicant files an application, he/she shall give written notice of said filing and send a copy of the application and one set of plans to each of the three aldermen representing the ward in which the proposed project is to be located; give written notice of said filing to the clerk of the board of aldermen; and give written notice to all immediate abutters of the property upon which the project is to be located.

The applicant shall give all reasonable assistance to the director of planning and development in his/her review of the site plan, including, but not limited to attendance at at least one meeting called by the director of planning and development.

(c) *Procedures.*

(1) The director of planning and development shall review said plan for compliance with section 30-8(d)(1). Further, the director may consider the application in light of the criteria set forth below:

a) Convenience and safety of vehicular and pedestrian movement within the site to adjacent streets;

b) Screening of parking areas and structure(s) on the site from adjoining premises or from the street by walls, fences, plantings or other means. Location of parking between any existing or proposed structures and the street shall be discouraged;

c) Design and location of exterior landings and stairs in a manner appropriate to the structure and unobtrusive to the neighborhood;

d) Disruption of historically significant structures and architectural elements.

e) The exterior appearance of the dwelling in which the accessory apartment is located is in keeping with the appearance of a single-family home.

(2) During said review the director of planning and development shall make recommendations to the applicant for changes in the plans, which changes shall be consistent with accepted and responsible planning principles.

Upon completion of the review process, the director of planning and development shall indicate, in writing, to the commissioner of inspectional services whether there has been compliance by the applicant with the procedural requirements as stated above and whether in his/her opinion, the applicant has complied with the requirements of section 30-8(d). This statement shall be made within sixty (60) days after receipt of the complete and proper site plan application as described in section 30-22(a).

If no such statement is received by the commissioner of inspectional services within the above-stated time period, he/she shall accept an application for the creation of the accessory apartment by a building permit, or occupancy permit if a building permit is not required, without receipt of such statement and he/she shall have six (6) months from the date of application within which to issue the building or occupancy permit.

If the applicant does not apply for a certificate of occupancy within one (1) year from the date of the original application to the director of planning and development, he/she must file for review under the procedures set forth above.

(3) The petitioner shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the certificate of occupancy for the accessory apartment which states that before ownership of the property changes, the current owner must apply to the commissioner of inspectional services for a new occupancy permit. Before issuing such occupancy permit, the commissioner of inspectional services must assure that the provisions of the Newton Zoning Ordinance and the State Building Code are met.

(4) The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(d) If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-22 is invalid as applied for any reason, then sections 30-22 and 30-8(d)(1) shall be declared null and void in their entirety. (Ord. No. T-114, 11-19-90)

ATTACHMENT 2

CITY OF NEWTON, MASSACHUSETTS

Department of Planning and Development

Telephone
(617)-796-1120
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(617) 796-1142
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(617) 796-1089

Setti D. Warren
Mayor

DATE: January 22, 2010

TO: Alderman Marcia T. Johnson, Chairman, and
Members of the Zoning and Planning Committee

FROM: Candace Havens, Acting Director of Planning and Development
Jennifer Molinsky, Principal Planner / Zoning and Planning Coordinator

SUBJECT: **WORKING SESSION**
ALD. HESS-MAHAN proposing the following amendments to the accessory apartment ordinances: (1) amend Sections 30-8(d)(1)a) and 30-9(h)(1)a) to explicitly allow the homeowner to live in the accessory apartment; (2) amend Section 30-9(h)(1) to allow accessory apartments in a single family residence located in Multi Residence 1 and Multi Residence 2 zoned districts; and (3) amend the provisions of Sections 30-8(d)(1)b) and 30-9(h)(1)b) to allow accessory apartments in residential buildings built 10 or more years before an application for a permit is submitted; (4) delete the provisions of Sections 30-8(d)(1)(h) and 30-9(h)(1)(h) that require landscape screening for fewer than 5 parking stalls; (5) amend Sections 30-8(d)(1)(d), 30-8(d)(1)(e), 30-8(d)(2)(b) and 30-9(h)(1)(d) to allow exterior alterations and add that any exterior alterations, other than alterations required for safety, are subject to FAR provisions.

CC: Board of Aldermen
Mayor Setti D. Warren
Planning and Development Board
John Lojek, Commisioner of Inspectional Services
Marie Lawlor, Assistant City Solicitor

This memo provides background and analysis for Petition #164-09, to be discussed at the Zoning and Planning Committee in its Working Session on January 25, 2010. The item has **not** yet been scheduled for public hearing.

I. BACKGROUND

Accessory apartments are typically small one-bedroom or studio apartments located within a residence; they are sometimes referred to as "in-law apartments," "granny flats," and "accessory dwelling units." Accessory apartments have a number of benefits. By utilizing existing dwellings, they can provide flexible and more affordable housing for a changing population (one that is aging, has increasing numbers of non-traditional families, and is characterized by smaller households), without the expense, environmental impact, and increased building density associated with new construction. Accessory apartments can enable some current residents to downsize to smaller units within their neighborhoods or to earn additional income that will enable them to stay in their homes, and sometimes provide additional income needed to preserve

historic homes. While there are numerous benefits to accessory units, there are also concerns that they may change neighborhood character or result in loss of privacy, noise, or parking congestion if too prevalent, and, when located near colleges, may bring problems sometimes associated with off-campus student housing.

The City of Newton allows accessory apartments subject to the regulations in the zoning ordinance. Under the ordinance, accessory apartments are allowed either as-of-right or by special permit in all Single Residence (SR) districts, and by special permit only in two-family dwellings in Multi-Residence 1 and 2 districts. As-of-right accessory apartments must follow a process called the Review of Accessory Apartment Petitions (RAAP) which includes submission of a site plan application and review by the Director the Planning Department for consistency with the zoning ordinance and to ensure safe pedestrian and vehicular access, unobtrusive design, and consideration of disruption of historical structures and architectural elements. For both as-of-right units created under the RAAP process and units created by special permit, Sections 30-8(d) and 30-9(h) of the ordinance specify minimum requirements for the property and main residence, size restrictions on the units themselves, parking requirements, and limits on exterior alterations that can be done to accommodate accessory units. The zoning ordinance also sets out four overlay districts (in or near the following neighborhoods: Chestnut Hill, Newton Centre, Newtonville, West Newton Hill, and Newton Corner) in which either the minimum lot or building size requirements, or both, are more restrictive. Current zoning is summarized in **Attachment 1**. In addition, the zoning ordinance, under Section 30-8(d)(4), also allows preexisting accessory units to be considered lawful uses provided certain criteria are met.

II. CREATION OF ACCESSORY APARTMENTS

Despite the allowance for accessory apartments in the zoning code, few have used the zoning provisions to create or legalize units: since 1995, only 28 accessory apartments have been created under zoning, five under the RAAP process and 23 by special permit. Additionally, eight preexisting units have been legalized. However, the City likely has many accessory units that have not been approved under the zoning code (and, potentially, the building code).

In 2006, with the goal of increasing the supply of affordable housing units in the City, the Board of Aldermen created the Accessory Apartment Incentive Program (AAIP) to assist homeowners in creating accessory units with affordability restrictions. AAIP was funded by the Community Preservation funds and administered by the Community Living Network (CLN). The program offered grants and loans to owners earning up to 125% of area median income to create accessory apartments for those earning up to 80% of area median income. Full-time students, with certain exceptions, were not allowed as tenants under the program.

Over 350 people indicated interest in creating accessible units under the program, but in the end, none participated and no units were created. CLN kept detailed records of reasons for the lack of participation; these are summarized in Table 1 below:

Table 1: Reasons Given for Nonparticipation in AAIP Program

Reason for Nonparticipation	Number
Property ineligible for the AAIP program:	104
Lots did not meet minimum lot sizes in Table 30-8	63
Involved single-family home in a Multi-Residence zone (unclear why this was an impediment, as single-family homes can be subdivided into two-family homes as-of-right; see discussion in Part III for more information)	29
Involved houses built after 1989 (prohibited under Sec. 30-8(d)(1)b) and Sec. 30-9(h)(1)b))	3
Involved homes that were not owner-occupied (prohibited by Sec. 30-8(d) and Sec. 30-9(d))	9
Property eligible, but owner decided not to apply for AAIP program:	74
Owner perceived deed restriction of AAIP program as too restrictive	38
Owner wanted to live in accessory apartment and rent primary residence (prohibited under Sec. Sec. 30-8(d)(1)a) and Sec. 30-9(h)(1)a); under these sections, owner must live in primary residence)	6
Owner wanted to do more new construction than was allowed (Sec. 30-8(d)(1)d) and e), Sec. 30-8(d)(2)b), and Sec. 30-9(h)(d) and e) restrict exterior construction that can be done to accommodate an accessory apartment)	7
Owner could not resolve building code or space issues	7

Due to the lack of results and the closing of CLN, the AAIP program was ended in March, 2009.

III. PETITION #164-09

Petition #164-09 proposes five amendments to lessen several of the impediments identified in the AAIP survey to the creation of accessory apartments under the zoning ordinance. Proposals 1, 3, and 4, which would allow a homeowner to live in either an accessory unit or the main dwelling; allow accessory apartments in residential buildings that are at least 10 years old; and remove screening requirements for parking spaces associated with accessory units, require relatively straightforward zoning text changes. Proposal 2, which would allow accessory apartments in single-family residences within Multi-Residence districts, is really a clarification issue, since single-family residences can already be divided into two units as-of-right, although the Planning Department does recommend clarifying that single-family residences may take this approach to creating another unit. Language supporting amendments 1 through 4 is proposed below for discussion purposes. Finally, Proposal 5, relating to exterior changes to a dwelling, is taken up separately.

Changes proposed by Petition #164-09:

1. **Explicitly allow the homeowner to live in the accessory unit by amending Sections 30-8(d)(1)a) and 30-9(h)(1)a).** Currently, Section 30-8(d)(1)a), concerning Single Residence districts, requires that "the building in which the accessory apartment is located is an owner occupied single family dwelling," while Section 30-9(h)(1)a), concerning Multi-Residence 1 and 2 districts, requires that the accessory apartment be located in "an owner occupied two family dwelling." Although the language in both sections is ambigious as to whether the owner ***must*** occupy the primary dwelling and not

the accessory unit, it has been interpreted to mean that the owner may occupy only the primary dwelling. The petition proposes allowing an owner to live in ***either*** the primary dwelling or the accessory unit.

2. **Allow accessory units in single-family homes within Multi-Residence (MR) 1 and 2 districts by amending Section 30-9(h)(1)a).** Currently, Section 30-9(h)(1)a) only allows the Board of Aldermen to issue a special permit for an accessory unit in a two-family home in the MR1 and MR2 districts. There is confusion, however, about whether single-family homes may have an accessory apartment if they are in MR districts. The accessory apartment ordinances make no mention of this possibility, leading some to believe that it is not possible to have an accessory unit in a single-family dwelling located in an MR district. However, The zoning ordinance ***does*** allow a single-family home to be divided into a two-family residence, and this can typically be done as-of-right, without some of the restrictions of the accessory apartment ordinance (such as the limit on the size of accessory units or limit on renovations). While the resulting unit would not technically be defined as an "accessory unit" under the zoning ordinance (it would instead be a "two-family dwelling"), it can surely function as one, and even be designed to be in keeping with the requirements of the accessory apartment ordinances should a homeowner so desire.

   The Planning Department recommends three steps to clarify the zoning ordinance and improve the opportunities for single-family homeowners to create accessory units. First, we recommend adding a footnote that simply notes that single family dwellings in MR districts may be divided into two dwelling units subject to all the requirements of the zoning code. This reference would hopefully steer potential applicants for accessory apartment permits to the relevant sections of the ordinance without creating the impression that there is no way a single-family home in an MR district can create a second dwelling unit.

   Second, while a single-family dwelling can be divided into two in a Multi-Residence district, it is not currently possible under the zoning ordinance to create the second unit in a detached structure associated with the single-family residence. We recommend clarifying that accessory apartments may be created by special permit in detached structures associated with ***either*** single-family dwellings or two-family dwellings in Multi-Residence districts.

   Finally, the Planning Department also recommends allowing the legalization of preexisting accessory apartments located in single-family dwellings within MR districts subject to the existing criteria in Section 30-9(h)(2), and changing references to "third dwelling unit" to "accessory apartment" throughout section 30-9(h).

3. **Allow accessory apartments in residential buildings built 10 or more years ago by amending Section 30-8(d)(1)b) and 30-9(h)(1)b).** Currently, the zoning ordinance does not allow accessory units in homes built after January, 1989 as a means to prevent homeowners and developers from including accessory apartments in new construction. The proposed change would update the ordinance by removing the specific date and

requiring instead that dwellings be ten or more years old before an accessory unit may be created.

Suggested language for proposed amendments 1, 2, and 3:

Section 30-8(d)(1)a) In single residence districts, an accessory apartment shall be a permitted use according to Table 30-8 and the following provisions:

(1) An accessory apartment is allowed in ~~an owner-occupied~~ single family dwelling in accordance with the procedures of section 30-22, as applicable, and subject to section 30-15, provided that:

a) The accessory apartment is located within a single family dwelling and the owner of the single family dwelling occupies either the dwelling or the accessory apartment; ~~The building in which the accessory apartment is located is an owner-occupied single family dwelling;~~

b) The single family dwelling was constructed ten or more years prior to the date of application for permit to construct an accessory apartment under this section as evidenced by a Certificate of Occupancy for the original construction of the dwelling, or, where no such certificate is available, provided that there is other evidence of lawful occupancy of the existing structure on or before a date at least ten years prior to the date of application; ~~on or before January 1, 1989;~~

Section 30-8(d)(2) The board of aldermen may grant a special permit in accordance with the procedure in section 30-24 for an accessory apartment in ~~an owner-occupied~~ single family dwelling or a legal non-conforming two-family dwelling or a detached structure provided that the provisions of section 30-8(d)(1) and Table 30-8 are met, except as amended below:

Section 30-9(h) *Additional Provisions Applicable in Multi-Residence 1 and 2 Districts.* In all multi-residence 1 and 2 districts, land and buildings may be used for the following purpose subject to the dimensional controls set forth in Table 30-8:

(1) The board of aldermen may grant a special permit for an accessory apartment in a two-family structure or in a detached structure associated with either a single-family or two-family structure in accordance with the procedure in section 30-24 provided that:*

a) The accessory apartment is located in a two family dwelling or detached structure, and the owner of the dwelling occupies either the dwelling or the accessory apartment; ~~The building in which the accessory apartment is located is an owner-occupied two family dwelling;~~

b) The two family dwelling was constructed ten or more years prior to the date of application for permit to construct an accessory apartment under this section as evidenced by a Certificate of Occupancy for the original construction of the dwelling, or, where no such certificate is available, provided that there is other evidence of lawful occupancy of the existing structure on or before a date at least ten years prior to the date of application; ~~on or before January 1, 1989;~~

Section 30-9(h)(1) footnote: * A single-family dwelling located in a Multi-Residence 1 or Multi-Residence 2 district may be divided into a two-family dwelling to accommodate a second dwelling unit, subject to compliance with the relevant requirements of the zoning ordinance.

Section 30-9(h)(2). Pre-existing Units. Notwithstanding the terms of section 30-9(h)(1) above, an accessory apartment ~~(third dwelling unit)~~ in a single-family or two family dwelling or a detached accessory structure, or an accessory apartment in a single family dwelling, shall be considered a lawful use and shall not be required to meet the dimensional criteria of Table 30-8 nor obtain a special permit subject to section 30-24 provided the following criteria are fulfilled:

Please see **Attachment 2** for a full version of existing and draft text relating to accessory apartments.

4. **Remove the requirement that parking for accessory apartments be screened by amending Sections 30-8(d)(1)h) and 30-9(h)(1)h).** Current zoning requires that one parking stall be provided for an accessory apartment, subject to certain dimensional and location requirements. The ordinance also requires that the parking space comply with screening requirements that ordinarily apply only to parking facilities containing five or more spaces, regardless of how many spaces are required at a particular residence. These screening requirements involve one or more of the following: a strip at least five feet in width of densely planted shrubs or trees at least 3.5 feet high; walls or fences with a minimum three foot landscaped strip between the wall/fence and street; or berms at least three feet high and 18 inches wide. The petition proposes removing the screening requirement for parking associated with accessory apartments.

   Suggested language for proposed amendment 4:

   Section 30-8(d)(1)h) Parking as required by sections 30-19(d)(19) and 30-19(g); ~~, and landscape screening as required by Section 30-19(i)(1) shall be provided regardless of the number of parking stalls;~~

   Section 30-9(h)(1)h) Parking as required by sections 30-19(d)(19) and 30-19(g); ~~, and landscape screening as required by Section 30-19(i)(1) shall be provided regardless of the number of parking stalls;~~

5. **Allow more exterior alterations, subject to existing dimensional requirements, by amending Sections 30-8(d)(1)d), 30-8(d)(1)e), and 30-9(h)(1)d).** Current zoning limits the amount of exterior alterations a homeowner may do to accommodate an accessory apartment to changes to meet building, fire, and health codes. For as-of-right units, a homeowner may add doors or windows, up to two exterior covered landings under 50 square feet each (outside of setbacks), stairs (outside of setbacks), and roof and wall venting. An owner may not expand a single-family dwelling to either meet the minimum building size requirements for an accessory apartment (as set out in Table 30-8) or to create space to accommodate the accessory apartment within four years of applying for a permit under the RAAP process or a special permit for accessory units in Single Residence districts, or within two years of applying for a special permit for accessory units in Multi-Residence districts. In Single and Multi-Residence districts, accessory units created under the special permit process must also be in keeping with the architectural and residential character of the neighborhood, and additions or extensions to the dwelling may not exceed 250 square feet in area or 25 percent of the final gross floor area of the accessory unit, whichever is greater. Petition #164-09 recommends amending

the ordinance to allow more extensive exterior alterations, provided they are in keeping with floor area ratio provisions.

The Planning Department interprets the petition as seeking to ease requirements on *additions* to exteriors (and not just *alterations* to windows, doors, or landings). If this interpretation is correct, the Planning Department finds good reason to ease restrictions on exterior changes, including both alterations and additions, and potentially to remove the requirement that changes must be made at least two or four years (depending on the zoning district) prior to applying for a permit for an accessory apartment. Such easing of the requirements can facilitate the creation of accessory units where current house size or configuration is a barrier, and removing the time restrictions can help in situations where homeowners have a sudden interest in creating an accessory unit; for example, when an accessory apartment could provide a housing solution for an elderly relative whose needs have suddenly changed.

However, we do recommend that the Committee consider the extent of changes it might wish to allow to exteriors. For example, the Committee may wish to consider the amount of change an addition may make to the character of a house and neighborhood. For example, changes to a façade to accommodate an accessory unit may have the effect of making a single-family home resemble a two-family home, which could be a concern in Single Residence neighborhoods. The petition makes clear that any alterations (and presumably additions) should be in keeping with floor area ratio; the Planning Department agrees, and also recommends that alterations and additions comply with *all* dimensional requirements of Section 30-15, Table 1, with the exception of lot area and minimum lot area per dwelling unit, since lot area and building size for accessory apartments are explicitly set out in Table 30-8.

The language suggested below can potentially fulfill the intent of Petition 146-09. For as-of-right apartments created under the RAAP process, we recommend allowing additions and removing the requirement that changes be made two or four years (depending on the zoning district) prior to application for an accessory apartment, but we do advocate some limits on exterior additions. For discussion purposes only, we provide language that would limit exterior additions to a certain percentage of the size of the dwelling or the accessory apartment. The Committee might also consider amending the RAAP section of the zoning ordinance to ensure that, in reviewing applications for accessory apartments, the Planning Director could consider the character of the neighborhood and architecture of the dwelling are considered, though this may not be an ideal solution, as neighborhood character can be quite subjective.

For as-of-right accessory apartments created under the RAAP process:

Section 30-8(d)(1)

d) Exterior alterations required to meet applicable building, fire or health codes are permitted as listed here: doors; windows; no more than two exterior landings which may be covered, which do not exceed fifty (50) square feet in area, and are not within the setback area; stairs which are not within the setback; roof and wall venting.

e) Exterior additions or alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements in Sec. 30-15, Table 1, and in no event shall additions exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment;* ~~Additions and exterior alterations to the structure made within four (4) years prior to application may not be applied towards meeting the requirements of Table 30-8*;~~

Section 30-22(c) (RAAP)

e) Consistency of additions or exterior alterations with the character of the neighborhood and architectural integrity of the structure;

In special permit cases, we recommend retaining the language regarding architectural integrity and the character of the neighborhood is useful to retain and applying it to any exterior addition made to accommodate an accessory apartment. Please note that, for consistency between the Single Residence and Multi-Residence sections of the zoning ordinance, we advocate removing the two-year waiting period set out in Section 30-9(h)(1)e) though this is not mentioned in the petition.

For special permit applications for accessory apartments in Single and Multi-Residence districts:

Section 30-8(d)(2)

b) Exterior alterations required to meet applicable building, fire or health codes are permitted if in keeping with the architectural integrity of the structure and the residential character of the neighborhood. Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1 and Section 30-15(u)(4) and provided that the alterations are in keeping with the architectural integrity of the structure and the residential character of the neighborhood. ~~Prospective additions or exterior alterations for the purpose of satisfying the gross floor area requirements for the creation of a proposed accessory apartment in an owner-occupied single family dwelling or a legal nonconforming two-family dwelling which is altered, reconstructed or redesigned for the purpose in whole or in part of satisfying the gross floor area requirements for the creation of a proposed accessory apartment may be allowed, but shall not exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment as provided in this sub-section, whichever is greater.~~ No additions or exterior alterations beyond those in the final grant of a petition may be proposed to enlarge the accessory apartment within two (2) years of receipt of a special permit hereunder from the board of aldermen.

Section 30-9(h)(1)

d) Exterior alterations required to meet applicable building, fire or health codes are permitted if in keeping with the architectural integrity of the structure and the residential character of

the neighborhood. Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1 and Section 30-15(u)(4) and provided that the alterations are in keeping with the architectural integrity of the structure and the residential character of the neighborhood. ~~Prospective additions or exterior alterations for the purpose of satisfying the gross floor area requirements for the creation of a proposed accessory apartment in an owner-occupied single family dwelling or a legal nonconforming two-family dwelling which is altered, reconstructed or redesigned for the purpose in whole or in part of satisfying the gross floor area requirements for the creation of a proposed accessory apartment may be allowed, but shall not exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment as provided in this sub-section, whichever is greater.~~ No additions or exterior alterations beyond those in the final grant of a petition may be proposed to enlarge the accessory apartment within two (2) years of receipt of a special permit hereunder from the board of aldermen.

~~e) Additions and exterior alterations to the structure made within two (2) years prior to application may not be applied towards meeting the requirements of Table 30-8;~~

Finally, the Planning Department recommends changing the definition of Accessory Apartment in Section 30-1, which currently refers only to single-family residences, even though the ordinance explicitly allows accessory units in two-family dwellings:

> ***Accessory apartment:*** A separate dwelling unit located in a building originally constructed as a single family or two-family dwelling or in a detached building located on the same lot as the single family or two-family dwelling, provided that such separate dwelling unit has been established pursuant to the provisions of section 30-8(d) and 30-9(h) of this ordinance.

Please refer to Attachment 2 for a full comparison of existing and draft language.

V. CONCLUSION

Addressing the five issues highlighted by petition #164-09 would make it easier to create accessory apartments under the zoning code. The Planning Department believes that the first four changes will have a modest but positive effect on the creation of accessory apartments, which can bring needed flexible and affordable housing to the City. Additionally, we are supportive of the fifth change relating to exterior modifications, though we recommend that there be some limit on the amount and/or nature of modification that is permitted.

Potential Effect on the Creation of Units

Allowing the homeowner to live in either the accessory unit or main dwelling, eliminating parking screening requirements normally applicable only to larger properties, and removing some of the limits one exterior renovations *(proposed changes #1, 4, and 5, respectively),* will facilitate the creation of units in qualifying properties. Allowing accessory units in detached structures in single-family residences in Multi-Residence districts and adding a note to remind

readers that single-family homes may be divided into two-family homes in Multi-Residence districts *(proposed amendment #2),* and allowing accessory apartments in homes that are 10 years old or more (as opposed to being constructed prior to 1989) *(proposed amendment #3)* will increase the number of properties eligible to house an accessory unit.

Together, these proposed changes can help encourage the creation of accessory apartments that:

- Offer new housing with lower environmental impacts, since accessory apartments are created within existing structures;
- Offer more affordable housing options for smaller households and an aging population, which may allow some Newton residences to stay in their neighborhoods (either in an accessory unit, or by gaining income from one in their own home);
- Offer owners of larger historic homes a means to retain and maintain those structures.

The proposed amendments are also consistent with the *Comprehensive Plan,* which states that accessory units are a way to retain "the physical, aesthetic, and economic diversity of the existing housing stock," and notes that "We need to facilitate modifications to existing housing that can serve housing goals, such as creating accessory apartments, where appropriate" (*Newton Comprehensive Plan*, p. 5-15).

The Planning Department also supports Ald. Hess-Mahan's recommendation in petition #164-09(2) for a study of minimum lot and building size requirements for accessory units. Based on the survey cited earlier, conducted for the Accessory Apartment Incentive Program, the greatest impediment to the creation of units is the minimum lot and building size requirements in Table 8.

Potential Effect on Neighborhoods

While the proposed changes will potentially add to the number of accessory apartments in the City, the Planning Department does not believe that the proposed changes, assuming some limitation to exterior modifications, will cause undue negative impacts on the character or quality of life in surrounding neighborhoods. Many of the critical requirements will remain: the owner of the accessory unit would still reside on the premises (though would be able to live in either the accessory apartment or main unit), and no lodgers would be allowed in the unit; the accessory unit would still be limited in size and no more than one accessory apartment would be allowed per lot; the accessory unit would not be permitted to be built into new construction but would only be allowed in homes that are 10 or more years old; and a parking space for the accessory unit would still be required. The Planning Department does not feel that allowing owners to reside in either an accessory apartment or the main dwelling, removing the screening requirement for parking, allowing accessory apartments in detached structures associated with single-family homes in Multi-Residence districts, or updating the ordinance to allow accessory apartments in homes older than ten years will have significant impacts on neighborhoods.

As noted above, while the Planning Department supports easing restrictions on exterior alterations and additions, we advise that these be limited in scope and impact so as to reduce potential impacts on neighbors from new construction and changes in character.

Attachment 1: Current Zoning Regarding Accessory Apartments

Zoning District	As-of-Right (using RAAP process)	Special Permit
Single Residence Districts 1, 2, 3	**See Section 30-8(d)(1) and 30-22** One unit allowed in a **single-family dwelling**, provided: • Owner occupies main dwelling • Unit is between 400 square feet and either 1000 square feet or 33% of the size of the main dwelling, whichever is less • Main dwelling was constructed before 1989 • One screened, onsite parking space is provided for accessory unit • Exterior alterations as specified in zoning to meet building, fire, or health codes are allowed provided they are not within setbacks • Additions/alterations made within previous four years may not be used to meet minimum building size requirements required for accessory apartments • Minimum lot and building sizes: *SR1: 25000 sq. ft. lot, 4000 sq. ft. dwelling* *SR2: 15000 sq. ft. lot, 3100 sq. ft. dwelling* *SR3: 10000 sq. ft. lot, 2500 sq. ft. dwelling* *Overlay A: 43500 sq. ft. lot, 4400 sq. ft. dwelling* *Overlay B: 16000 sq. ft. lot, 3600 sq. ft. dwelling* *Overlay C: 10000 sq. ft. lot, 3100 sq. ft. dwelling* *Overlay D: 30000 sq. ft. lot, 4000 sq. ft. dwelling*	**See Section 30-8(d)(2)** One unit allowed in a **single-family** or **legally nonconforming two-family dwelling** or **detached structure**, provided: • Owner occupies main dwelling • Unit is between 400 square feet and either 1200 square feet or 33% of the size of the main dwelling, whichever is less • Main dwelling was constructed before 1989 • One screened, onsite parking space is provided for accessory unit • Exterior alterations as specified in zoning to meet building, fire, or health codes are allowed if in keeping with the architecture of the dwelling and character of the neighborhood; alterations to meet minimum building size requirements shall not exceed 250 square feet of 25% of final gross floor ara of the accessory apartment • No additional exterior alterations are allowed to enlarge the accessory unit within two years following granting of special permit • Minimum lot and building sizes: *SR1: 15000 sq. ft. lot, 3200 sq. ft. dwelling* *SR2: 10000 sq. ft. lot, 2600 sq. ft. dwelling* *SR3: 7000 sq. ft. lot, 1800 sq. ft. dwelling* *Overlay A: 15000 sq. ft. lot, 3200 sq. ft. dwelling* *Overlay B: 10000 sq. ft. lot, 2600 sq. ft. dwelling* *Overlay C: 7000 sq. ft. lot, 1800 sq. ft. dwelling* *Overlay D: 15000 sq. ft. lot, 3200 sq. ft. dwelling*

Zoning District	As-of-Right (using RAAP process)	Special Permit
Multi-Residence Districts 1 and 2	Not Applicable (but note that a single-family home can be divided into a two-family home in a Multi-Residence district as-of-right, and that the second unit may function as an accessory apartment).	**See Section 30-9(h)** One unit allowed in a **two-family dwelling,** provided: • Owner occupies main dwelling • Unit is between 400 square feet and either 1,000 square feet or 33% of the size of the main dwelling, whichever is less • Main dwelling was constructed before 1989 • One screened, onsite parking space is provided for accessory unit • No additional exterior alterations are allowed to enlarge the accessory unit within two years following granting of special permit • Exterior alterations as specified in zoning to meet building, fire, or health codes are allowed if in keeping with the architecture of the dwelling and character of the neighborhood; alterations to meet minimum building size requirements shall not exceed 250 square feet of 25% of final gross floor ara of the accessory apartment • Minimum lot and building sizes: *SR1: 25,000 sq. ft. lot, 4,000 sq. ft. dwelling* *SR2: 15,000 sq. ft. lot, 3,100 sq. ft. dwelling* *SR3: 10,000 sq. ft. lot, 2,500 sq. ft. dwelling* *Overlay A: 43,500 sq. ft. lot, 4,400 sq. ft. dwelling* *Overlay B: 16,000 sq. ft. lot, 3,600 sq. ft. dwelling* *Overlay C: 10,000 sq. ft. lot, 3,100 sq. ft. dwelling* *Overlay D: 30,000 sq. ft. lot, 4,000 sq. ft. dwelling*

Attachment 2: Current and Draft Language Regarding Accessory Apartments

Sec. 30-1. Definitions.

Accessory apartment: A separate dwelling unit located in a building originally constructed as a single family or two-family dwelling or in a detached building located on the same lot as the single family or two-family dwelling, provided that such separate dwelling unit has been established pursuant to the provisions of section 30-8(d) and 30-9(h) of this ordinance.

Sec. 30-8. Use Regulations for Single Residence Districts.

(d) In single residence districts, an accessory apartment shall be a permitted use according to Table 30-8 and the following provisions:

(1) An accessory apartment is allowed in ~~an owner occupied~~ single family dwelling in accordance with the procedures of section 30-22, as applicable, and subject to section 30-15, provided that:

a) The accessory apartment is located within a single family dwelling and the owner of the single family dwelling occupies either the dwelling or the accessory apartment; ~~The building in which the accessory apartment is located is an owner occupied single family dwelling;~~

b) The single family dwelling was constructed ten or more years prior to the date of application for permit to construct an accessory apartment under this section as evidenced by a Certificate of Occupancy for the original construction of the dwelling, or, where no such certificate is available, provided that there is other evidence of lawful occupancy of the existing structure on or before a date at least ten years prior to the date of application; ~~on or before January 1, 1989;~~

c) The accessory apartment shall be a minimum of four hundred (400) square feet and a maximum of one thousand (1000) square feet or thirty-three percent (33%) of the total building size in the dwelling structure, whichever is less;~~*~~

d) Exterior alterations required to meet applicable building, fire or health codes are permitted as listed here: doors; windows; no more than two exterior landings which may be covered, which do not exceed fifty (50) square feet in area, and are not within the setback area; stairs which are not within the setback; roof and wall venting~~;~~.

e) Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1;

~~e) Additions and exterior alterations to the structure made within four (4) years prior to application may not be applied towards meeting the requirements of Table 30-8;*~~

f) No more than one accessory apartment shall be allowed per lot;

g) There shall be no lodgers in either the original dwelling unit or the accessory apartment;

h) Parking as required by sections 30-19(d)(19) and 30-19(g)~~, and landscape screening as required by section 30-19(i)(1) shall be provided, regardless of the number of parking stalls~~;

i) The apartment shall comply with all applicable building, fire and health codes.

~~* Requirements marked with an asterisk may be altered by a Special Permit. See Section 30-8(d)(2).~~

(2) The board of aldermen may grant a special permit in accordance with the procedure in section 30-24 for an accessory apartment in ~~an owner-occupied~~ single family dwelling or a legal non-conforming two-family dwelling or a detached structure provided that the provisions of section 30-8(d)(1) and Table 30-8 are met, except as amended below:

a) The accessory apartment shall be a minimum of four hundred (400) square feet and a maximum of twelve hundred (1,200) square feet, or thirty-three percent (33%) of the total building size in the dwelling structure, whichever is more;

b) Exterior alterations required to meet applicable building, fire or health codes are permitted if in keeping with the architectural integrity of the structure and the residential character of the neighborhood. Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1 and Section 30-15(u)(4) and provided that the alterations are in keeping with the architectural integrity of the structure and the residential character of the neighborhood.. ~~Prospective additions or exterior alterations for the purpose of satisfying the gross floor area requirements for the creation of a proposed accessory apartment in an owner-occupied single family dwelling or a legal nonconforming two-family dwelling which is altered, reconstructed or redesigned for the purpose in whole or in part of satisfying the gross floor area requirements for the creation of a proposed accessory apartment may be allowed, but shall not exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment as provided in this sub-section, whichever is greater.~~ No additions or exterior alterations beyond those in the final grant of a petition may be proposed to enlarge the accessory apartment within two (2) years of receipt of a special permit hereunder from the board of aldermen.

The petitioner shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the board order granting the accessory apartment and certified copies shall be filed with the department of inspectional services, where a master list of accessory apartments shall be kept, and with the assessing department.

When ownership of the property changes, the new owner shall notify the commissioner of inspectional services at which time the commissioner of inspectional services shall conduct a determination of compliance with the board order, the Newton Zoning Ordinance and the State Building Code.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(3) An accessory apartment is allowed in an Overlay District according to the provisions of Section 30-8(d) and Table 30-8. The following land is placed in an Overlay District as specified:

a) Single Residence 1 zoned land in real estate section 63 is placed in Overlay District A.

b) Single Residence 2 zoned land in real estate section 32 is placed in Overlay District B.

c) Single Residence 3 zoned land in real estate section 71 is placed in Overlay District C.

d) Single Residence 1 zoned land in real estate section 61 is placed in Overlay District D.

(4) Pre-existing Units. Notwithstanding the terms of section 30-8(d)(1)-(3) above, an accessory apartment (second dwelling unit) in a single-family dwelling or detached accessory structure shall be considered a lawful use and shall not be required to meet the dimensional criteria of Table 30-8 provided the following criteria are fulfilled:

a) Proof of Existence. An owner-occupant seeking validation of an existing accessory apartment unit as described herein shall have the burden of proof to demonstrate by a preponderance of evidence the existence of said dwelling unit as of December 31, 1979 and ongoing from that date forward by submission of probative documentary evidence to the commissioner of inspectional services. Records including, but not limited to the following, may be submitted:

i) A valid building alteration permit for the premises indicating the construction of the aforesaid second dwelling unit; or

ii) Assessing department records for the premises indicating the existence of the aforesaid second dwelling unit; or

iii) Records of Internal Revenue Service tax returns for the owner(s) of the premises including Form 1040 and Form 1040 Schedule E indicating items such as reported rental income, deductions for improvements to real estate, reported losses on rental income, and casualty losses, all related to the aforesaid second dwelling unit; or

iv) Permits from the department of inspectional services, other than the actual building alteration permit which provided for construction of the aforesaid dwelling unit, such as other building permits, plumbing, electrical and gas fitting permits, which explicitly indicate the existence of the aforesaid second dwelling unit; or

v) Sworn affidavits by former or present tenants of the aforesaid second dwelling unit, or a previous or present owner-occupant of the premises, providing a sworn, notarized attestation as to the existence of the said unit; or

vi) Any other documentary evidence which is material and relevant and demonstrates the existence of said dwelling unit as of December 31, 1979 and forward.

b) Standard of Proof. Conflicting Evidence. If the documentary evidence available is conflicting, the commissioner of inspectional services shall determine after weighing all the evidence if the existence of the dwelling unit as of December 31, 1979 and forward from that date is supported by a preponderance of evidence.

If no department of inspectional services records or assessing department records are available for a given premises, then sworn, notarized affidavits as provided above in section 30-8(d)(4)a)v) shall be presumed to be reliable, unless there is substantial evidence to the contrary.

c) Requirements. The requirements of section 30-8(d)(1)a), b), c), d), f), g), h) and i) must be satisfied.

d) Procedure. Application for the validation of the second dwelling unit under this section 30-8(d)(4) shall be made in accordance with section 30-22(b). The director of planning and development shall review the application for compliance with all the requirements of section 30-8(d)(4)c) above.

Within sixty (60) days of receipt of the completed section 30-8(d)(4) application, the director of planning and development shall indicate in writing to the commissioner of inspectional services whether there has been compliance with all the requirements of section 30-8(d)(4)c) and section 30-22(b).

Upon receipt of notification of compliance from the director of planning and development, the commissioner of inspectional services shall review the application for compliance with all zoning, building, health, fire and safety codes on the premises.

The owner-occupant applicant must secure a certificate of occupancy from the department of inspectional services within one (1) year of the date of the completed section 30-8(d)(4) application for the lawful use of the second dwelling unit. Upon expiration of said one (1) year, if the applicant has not secured said certificate of occupancy, the applicant shall be precluded from any lawful use of the second dwelling unit under the provisions of section 30-8(d)(4). Upon request by the applicant prior to expiration of the aforesaid one year, the commissioner of inspectional services may grant a six (6) month extension if the commissioner deems it appropriate and justified due to extenuating circumstances.

The applicant shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the certificate of occupancy for the accessory apartment which states that before ownership of the property changes, the current owner must apply to the commissioner of inspectional services for a new occupancy permit. Before issuing such occupancy permit, the commissioner of inspectional services must assure that the provisions of the Newton Zoning Ordinance and the State Building Code are satisfied.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(5) If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-8(d) is invalid as applied for any reason, then section 30-8(d) shall be declared null and void in its entirety. (Ord. No. T-41, 8-14-89; Ord. No. T-114, 11-19-90; Ord. No. T-247, 10-5-92; Ord. No. T-306, 11-1-93; V-120, 7-14-97; V-156, 1-5-98; V-173, 5-18-98; V-246, 6-7-99; Ord. No. X-37, 12-2-02; Ord. No. Y-10,4-17-07

TABLE 30-8 DIMENSIONAL REQUIREMENTS FOR ACCESSORY APARTMENTS

	LOT SIZE (s.f.)	BUILDING SIZE (s.f.)
SR1		
RAAP	25,000	4,000
SPECIAL PERMIT	15,000*	3,200
SR2		
RAAP	15,000	3,100
SPECIAL PERMIT	10,000*	2,600
SR3		
RAAP	10,000	2,500
SPECIAL PERMIT	7,000*	1,800

OVERLAY A		
RAAP	43,500	4,400
SPECIAL PERMIT	15,000*	3,200
OVERLAY B		
RAAP	16,000	3,600
SPECIAL PERMIT	10,000*	2,600
OVERLAY C		
RAAP	10,000	3,100
SPECIAL PERMIT	7,000*	1,800
OVERLAY D		
RAAP	30,000	4,000
SPECIAL PERMIT	15,000*	3,200
LEGAL NON-CONFORMING TWO-FAMILY IN SR1, SR2, SR3		
SPECIAL PERMIT	25,000*	2,600
MR1, MR2		
SPECIAL PERMIT	8,000	2,600

*If building constructed on lot created prior to December 7, 1953.

Sec. 30-9. Use Regulations for Multi-Residence Districts.

(h) *Additional Provisions Applicable in Multi-Residence 1 and 2 Districts.* In all multi-residence 1 and 2 districts, land and buildings may be used for the following purpose subject to the dimensional controls set forth in Table 30-8:

(1) The board of aldermen may grant a special permit for an accessory apartment in a two-family structure or in a detached structure associated with either a single-family or two-family structure in accordance with the procedure in section 30-24 provided that:*

a) The accessory apartment is located in a single family or two family dwelling or detached structure, and the owner of the dwelling occupies either the dwelling or the accessory apartment; ~~building in which the accessory apartment is located is an owner-occupied two family dwelling;~~

b) The two family dwelling was constructed ten or more years prior to the date of application for permit to construct an accessory apartment under this section as evidenced by a Certificate of Occupancy for the original construction of the dwelling, or, where no such certificate is available, provided that there is other evidence of lawful occupancy of the existing structure on or before a date at least ten years prior to the date of application; ~~on or before January 1, 1989;~~

c) The accessory apartment shall be a minimum of four hundred (400) square feet and a maximum of twelve hundred (1,200) square feet;

d) Exterior alterations required to meet applicable building, fire or health codes are permitted if in keeping with the architectural integrity of the structure and the residential character of the neighborhood. Exterior alterations for any other purpose are permitted provided that the structure complies with the minimum lot size and building size requirements in Table 30-8 and the frontage, setback, floor area ratio, building height, story, building coverage, and open space requirements set out in Sec. 30-15, Table 1 and Section 30-15(u)(4) and provided that the alterations are in keeping with the architectural integrity of the structure and the residential character of the neighborhood... ~~Prospective additions or exterior alterations for the purpose of satisfying the gross floor area requirements for the creation of a proposed accessory apartment in the owner-occupied two-family dwelling which is altered, reconstructed or redesigned for the purpose in whole or in part of satisfying the gross floor area requirements for the creation of a proposed accessory apartment may be allowed, but shall not exceed 250 square feet in area or 25 percent of the final gross floor area of said accessory apartment as provided in this sub-section, whichever is greater.~~ No additions or exterior alterations beyond those in the final grant of a petition may be proposed to enlarge the accessory apartment within two (2) years of the receipt of a special permit hereunder from the board of aldermen;

~~e) Additions and exterior alterations to the structure made within two (2) years prior to application may not be applied towards meeting the requirements of Table 30-8;~~

~~f~~e) No more than one accessory apartment shall be allowed per lot. This shall include instances where the two dwelling units in a two family structure are separately owned and instances where more than one habitable structure occupy a single lot;

~~g~~f) There shall be no lodgers in either the original dwelling units or the accessory apartment;

~~h~~g) Parking as required by sections 30-19(d)(19) and 30-19(g)~~, and landscape screening as required by section 30-19(i)(1) shall be provided, regardless of the number of stalls~~;

~~i~~h) The apartment shall comply with all applicable building, fire and health codes.

The petitioner shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the board order granting the accessory apartment and certified copies shall be filed with the department of inspectional services, where a master list of accessory apartments shall be kept, and with the assessing department.

When ownership of the property changes, the new owner shall notify the commissioner of inspectional services at which time the commissioner of inspectional services shall conduct a determination of compliance with the board order, the Newton Zoning Ordinance and State Building Code.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(2) Pre-existing Units. Notwithstanding the terms of section 30-9(h)(1) above, an accessory apartment ~~(third dwelling unit)~~ in a single-family or two family dwelling or a detached accessory structure shall be considered a lawful use and shall not be required to meet the dimensional criteria of Table 30-8 nor obtain a special permit subject to section 30-24 provided the following criteria are fulfilled:

a) Proof of Existence. An owner-occupant seeking validation of an existing accessory apartment unit as described herein shall have the burden of proof to demonstrate by a preponderance of evidence the existence of said dwelling unit as of December 31, 1979 and ongoing from that date forward by submission of probative documentary evidence to the commissioner of inspectional services. Records including, but not limited to the following, may be submitted:

i) A valid building alteration permit for the premises indicating the construction of the aforesaid ~~third dwelling unit~~ accessory apartment; or

ii) Assessing department records for the premises indicating the existence of the aforesaid ~~third dwelling unit~~ accessory apartment; or

iii) Records of Internal Revenue Service tax returns for the owner(s) of the premises including Form 1040 and Form 1040 Schedule E indicating items such as reported rental income, deductions for improvements to real estate,

reported losses on rental income, and casualty losses, all related to the aforesaid ~~third dwelling unit~~ accessory apartment; or

iv) Permits from the department of inspectional services, other than the actual building alteration permit which provided for construction of the aforesaid dwelling unit, such as other building permits, plumbing, electrical and gas fitting permits, which explicitly indicate the existence of the aforesaid ~~third dwelling unit~~ accessory apartment; or

v) Sworn affidavits by former or present tenants of the aforesaid second dwelling unit, or a previous or present owner-occupant of the premises, providing a sworn, notarized attestation as to the existence of the said ~~unit~~accessory apartment; or

vi) Any other documentary evidence which is material and relevant and demonstrates the existence of said ~~dwelling unit~~accessory apartment as of December 31, 1979 and forward.

b) Standard of Proof. Conflicting Evidence. If the documentary evidence available is conflicting, the commissioner of inspectional services shall determine after weighing all the evidence if the existence of the ~~dwelling unit~~accessory apartment as of December 31, 1979 and ongoing forward from that date is supported by a preponderance of evidence.

If no department of inspectional services records or assessing department records are available for a given premises, then sworn, notarized affidavits as provided above in section 30-8(d)(4)a)v) shall be presumed to be reliable, unless there is substantial evidence to the contrary.

c) Requirements. The requirements of section 30-9(h)(1)a), b), c), f), g), h) and i) and section 30-8(d)(1)d) must be satisfied.

d) Procedure. Application for the lawful use of the ~~third dwelling unit~~accessory apartment under this section 30-9(h)(2) shall be made in accordance with section 30-22(b). The director of planning and development shall review the application for compliance with all the requirements of section 30-9(h)(2)c) above.

Within sixty (60) days of receipt of the completed section 30-9(h)(2) application, the director of planning and development shall indicate in writing to the commissioner of inspectional services whether there has been compliance with all the requirements of section 30-9(h)(2)c) and section 30-22(b).

Upon receipt of notification of compliance from the director of planning and development, the commissioner of inspectional services shall review the application for compliance with all zoning, building, health, fire and safety codes on the premises.

The owner-occupant applicant must secure a certificate of occupancy from the department of inspectional services within one (1) year of the date of the completed section 30-9(h)(2) application for the lawful use of the ~~third dwelling unit~~accessory apartment. Upon expiration of said one (1) year, if the applicant has not secured

said certificate of occupancy, the applicant shall be precluded from any lawful use of ~~the third dwelling unit~~accessory apartment under the provisions of section 30-9(h)(2). Upon request by the applicant prior to expiration of the aforesaid one (1) year, the commissioner of inspectional services may grant a six (6) month extension if the commissioner deems it appropriate and justified due to extenuating circumstances.

The applicant shall record with the Registry of Deeds for the Southern District of Middlesex County a certified copy of the certificate of occupancy for the accessory apartment which states that before ownership of the property changes, the current owner must apply to the commissioner of inspectional services for a new occupancy permit. Before issuing such occupancy permit, the commissioner of inspectional services must assure that the provisions of the Newton Zoning Ordinance and the State Building Code are met.

The owner of the subject property shall file with the commissioner of inspectional services an affidavit attesting to the continued residence of the owner on the subject property. Such affidavit shall be filed annually from the date of the issuance of the certificate of occupancy.

(3) If it shall be determined by a court of competent jurisdiction that any provision or requirement of section 30-9(h) is invalid as applied for any reason, then section 30-9(h) shall be declared null and void in its entirety. (Ord. No. T-114, 11-19-90; Ord. No. T-247, 10-5-92; Ord. No. T-306, 11-1-93; Ord. No. V-173, 5-18-98; Ord. No. V-246, 6-7-99; Ord. No. X-37, 12-2-02; Ord. No. Y-10, 4-17-07)

* A single-family dwelling located in a Multi-Residence 1 or Multi-Residence 2 district may be divided into a two-family dwelling to accommodate a second dwelling unit, subject to compliance with the relevant requirements of the zoning ordinance.